itself -- illustrates that industry experience need not be a "club" which only incumbent broadcasters can join. If the Commission wishes to demonstrate that only broadcasters possess the experience necessary to adequately implement ATV, it needs to create a factual record identifying the types of experience it deems necessary, broadcasters' possession of those qualifications, and non-broadcasters' concomitant inability to meet the standards which the Commission has set. To the Alliance's knowledge, it has not yet done so.

The Commission has also argued that only broadcasters should initially be issued ATV licenses because they will be the only ones making the investment and taking the risks.[54] This tautology hardly merits response. The Alliance hopes that future Commission reports or orders will not restate this argument, which, if anything, only emphasizes the complete lack of justification for the policy it purports to defend.

B. The Commission Must Hold an Auction or "Ashbacker" Comparative Hearing.

The Communications Act permits the Commission to award mutually exclusive licenses subject to comparative hearing[55] or, if the license involves subscription services, by auction at the

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[54] Id.

[55] 47 U.S.C. Sec. 309(e).

Commission's discretion.[56] The Commission correctly acknowledges that settled administrative and case law permits the Commission to promulgate reasonable standards for license eligibility, both for initial licenses and for renewals.[57] It is well-settled that broadcasters must meet certain nominal public interest requirements in order to be eligible for license renewal[58]; and all forms of telecommunications must meet minimal standards of "public interest, convenience, or necessity."[59] Traditionally, courts have given regulatory agencies significant leeway over agency rulemaking, on the principle that the court should not substitute its judgment for that of the agency. A court will generally void a regulation or order only if the agency's decision is not supported by substantial evidence, or if the agency has made a clear error in judgment.[60]

The eligibility standard that the Commission has adduced for ATV -- incumbency -- will not withstand such judicial scrutiny. The Commission, of course, may give a preference to incumbents in

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[56]47 U.S.C. Sec. 309(j).

[57]United States v. Storer Broadcasting Co., 351 U.S. 192; See also Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 439 (D.C. Cir. 1991) ("Aeronautical I").

[58]Central Florida Enterprises, Inc. v FCC, 683 F.2d 503, 507 (D.C. Cir. 1982).

[59]See 47 U.S.C. Sec. 303; see also Radio Act of 1927 Secs. 4, 9, 11, 21.

[60]Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1317 (D.C. Cir. 1995); American Message Centers, supra, 50 F.3d at 35; See also Rainbow Broadcasting Co. v. FCC, 949 F2d 405, 409 (D.C. Cir. 1991)(emphasizing wide latitude in agency's rulemaking authority).

the issuance of a renewal license[61], based on the public interest in "renewal expectancy,"[62] and the Commission may also give priority to certain non-statutory categories of applicants.[63] However, these preferences must be justified with some kind of record demonstrating why they are in the public interest. Categorical eligibility requirements imposed by the Commission have been upheld when they have respond to a legitimate public interest concern, such as the Commission's desire to promote local television station ownership[64] or to protect the public.[65]

The incumbency expectation cited in Central Florida is inapposite in this case; ATV service has not yet been introduced, and there is no viewer expectation of any sort. Even if broadcasters plausibly argue that viewers expect incumbent broadcasters to participate in ATV development, there is certainly no viewer expectation that other market entrants will initially be barred. The Commission, if it is to rely on an "incumbency expectation," should demonstrate conclusively that there is a similar "exclusivity expectation" and that satisfying

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[61]Central Florida Enterprises, 683 F.2d at 507.

[62]Id.

[63]See Hispanic Information & Telecommunications Network v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989). In this case, the Court upheld the FCC's categorical priority for local non-commercial broadcast license applicants in denying Ashbacker comparative hearings before the priority period had expired.

[64]Id.

[65]Central Florida Enterprises, 683 F.2d at 507.

this expectation is somehow in the public interest.

The Commission asserts that limiting licenses to incumbents is in the public interest,[66] but fails to adduce any evidence of a public interest that can be served. Its failure to build a record or rationale makes this proposal vulnerable to a ruling that the rulemaking is "arbitrary and capricious."[67]

The Commission's reliance on Aeronautical I for its authority to impose eligibility requirements is misplaced; the Fourth Notice fails to mention that the Commission's rulemaking was actually invalidated for being arbitrary and capricious.[68] In Aeronautical I, the Commission attempted to evade its statutory responsibility to hold Ashbacker[69] hearings by creating a "consortium" which an applicant was required to join if it wanted a mobile satellite license. The D.C. Circuit held that this "criterion" created an effective deviation from the statutorily prescribed comparative hearing procedure without providing a "compelling" reason for doing so,[70] as the Commission has failed to do here. Indeed, in Aeronautical II[71], a review on remand of Aeronautical I, the Court, while not

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[66]Fourth Notice at 11, Par. 26.

[67]5 U.S.C. Sec. 706(2)(C) (1988); See also American Message Centers v. FCC, 50 F.3d 35, 39 (D.C. Cir. 1995).

[68]Aeronautical I, 928 F.2d at 453.

[69]Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

[70]Id. (emphasis included).

[71]Aeronautical Radio Inc. v. FCC, 983 F.2d 275 (D.C. Cir. 1993).

reaching the issue of the Commission's "consortium" plan, noted that it remained concerned that the Commission's attempt to circumvent "Ashbacker" hearings was "dubious."[72]

VI. THE COMMISSION SHOULD PROVIDE ATV SPECTRUM FOR NON-COMMERCIAL AND LOW-POWER BROADCASTERS.

In theory, 400 MHz of spectrum[73] allocated to advanced television will permit 400 separately-programmed NTSC quality digital channels to be broadcast in any given locality without any channel creating signal interference from adjacent channels operating in the same geographic area.[74] Even if the Commission decides to require HDTV implementation instead, 66 full-power television stations could broadcast in the same geographic area without adjacent-signal interference.[75]

Given the significant expansion in spectrum capabilities, the Alliance is hard-put to understand the necessity of displacing current low-power analog broadcast operations, particularly when most markets have only three or four currently operating VHF television stations.[76] As the Commission notes, the average spectrum use per market is 80 MHz, and in the top

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[72]Aeronautical II, 983 F.2d at 284.

[73]See Fourth Notice at 22 - 23.

[74]Id.

[75]Id.

[76]63 Television & Cable Factbook at C-4 (1995).

markets, only 120 MHz -- 30 percent -- is used.[77]

According to a report distributed by the National Association of Broadcasters, 6,542 Mhz of spectrum have been authorized for shared use by the federal government and the private sector, none of which has yet been allocated by the Commission.[78] However, the Commission limited its reallocation to existing VHF/UHF frequencies.[79] The Alliance believes that a fuller record is necessary to demonstrate that no contiguous 400 MHz block of spectrum is available, before it displaces LPTV stations.

The Commission's defense of its decision to displace LPTV stations was also based on circular reasoning: because low-power television stations were accorded secondary status by the Commission,[80] the Commission found that it could treat them as second class citizens.[81] The Commission then blamed the victims by suggesting that its decision was based in part, on the failure of low power television station representatives to attend meetings of the Advisory Committee.[82]

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[77]Fourth Notice at 33, Par. 87.

[78]Association for Maximum Service Television, Inc., et al, "Spectrum: Who Uses How Much, What the Public Gets for It and How the Public Could Derive More Benefits From It," unpublished paper (July 18, 1995) at 9.

[79]See Second Report/Further Notice at 3351 n. 119.

[80]Third Report/Further Notice, 7 FCC Rcd at 6953, Par. 37.

[81]Third Report/Further Notice at 6953.

[82]Id.

The Alliance's concern with LPTV stations rests on the belief that displacement of current assignments would give an undue competitive advantage to full-power broadcasters by imposing hardships on present and future LPTV and non-commercial stations. We urge the Commission to promulgate a regime which attempts to equalize the regulatory balance between commercial full-power stations and LPTV and non-commercial ones. If the Commission goes forward with its plan to issue licenses exclusively to broadcasters, Low-power stations should be eligible, should be offered more liberal construction and operation schedules, and should qualify for relaxed funding criteria, as proposed in the Fourth Notice[83].

There are numerous alternatives to the "displace and deny" policy contemplated by the Commission. The Commission could, for instance, mandate that a primary commercial station lease one or more of its additional channels to an incumbent LPTV or non-commercial station on a cost-based computation of fees. The Commission could also allow a "condominium plan," in which a governmental or quasi-public entity would be responsible for leasing channels to non-commercial and LPTV stations. Both are better options than displacement of current allocations in expectation of eventual conversion licenses.

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[83] Fourth Notice at 26-28, Pars. 70-76.

VII. THE COMMISSION SHOULD DELAY CONSIDERATION OF ISSUES RAISED BY CABLE "MUST-CARRY" PROVISIONS PENDING FEDERAL COURT ACTION.

The Alliance is concerned that, when cable franchises are granted or come up for renewal, cable operators will argue that the "must-carry provisions" of the Cable Act of 1984[84] prevent them from continuing to provide PEG or leased access capacity on their systems. The constitutionality of these provisions is currently under review;[85] the Commission should await the district court's (and if necessary, the D.C. Circuit and Supreme Court's) judgment before instituting a rulemaking on this issue. The Alliance supports a rule which will enable both broadcast and cable channels to carry the widest possible range of educational, public service, and non-commercial voices. Assuming that the "must-carry" provisions are sustained, the Alliance urges the Commission to require that PEG, public and local non-commercial television stations are given preference over any additional channels that incumbent broadcasters may request.

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[84]47 U.S.C. Secs. 534, 535.

[85]Turner Broadcasting Service, Inc. v. FCC, Dk. Civ. 92-2247 (D.D.C. 1995).

VIII. ALTERNATIVES TO SPECTRUM GIVEAWAY MEET THE COMMISSION'S WELL-SETTLED POLICY GOALS

A. The Commission Must Require Broadcasters to Compensate The Public for Use of The Public's Spectrum.

Because of the significant value of the broadcast spectrum and the government's right to regulate it in the public interest, digital broadcasting entities, new or incumbent, should be required to compensate the federal government for use of spectrum in one of the following ways:

(1) The Commission could issue incumbents and new entrants a "unified" license combining a free over-the-air broadcast license and an A&S license. Incumbents would receive an NTSC/ATV combined license in their next renewal cycle, and new entrants would receive ATV-only license, subject to Ashbacker hearings. The Commission would charge each licensee a fee approximately equal to the price the licensee would have been required to pay at open auction.

(2) The Commission could issue both incumbents and new entrants the "unified" license above, using the same methodology, except that the fee would be set pursuant to either a rate-setting hearing or as a gross-receipts tax.

(3) The Commission could permit incumbent broadcasters free spectrum for transition to free over-the-air digital broadcasting only. Separate A&S licenses would be issued at

open auction.

(4) The Commission could issue "unified" ATV/A&S licenses at open auction. Should an incumbent broadcaster fail to secure a frequency at the auction, a "unified" licensee would be required to maintain one "leased access" channel to allow the NTSC licensee to transmit its signal on an "incremental-cost" basis.

(5) The Commission could issue at open auction "transmission only" (quasi common-carrier) licenses. Should an incumbent broadcaster secure a license, it would be required to create a separate corporate subsidiary for the ATV transmission operation, and deal with its parent on an arm's-length basis. Licensees would be required to open their transmission facilities not only to any potential broadcaster, but any potential provider of A&S as well. Carriage costs would be set by the market.

(6) The Commission could require broadcasters to negotiate a lease for "unified" spectrum use, rather than a license. Each lease, and its terms would be open to negotiation between the Commission and the potential lessee. Each executed lease would be a public document, open to public inspection. Current broadcasters would be permitted to negotiate their leases first; new entrants would be permitted to seek a lease after incumbents had been offered the opportunity.

Both the U.S. House of Representatives and the U.S. Senate have included language in pending telecommunications legislation which would authorize the Commission to charge and collect fees for A&S equivalent to the amounts that would have been charged if the ancillary spectrum had been auctioned pursuant to Section 309(j) of the Communications Act.[86] Unfortunately, neither bill

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[86]The House bill, H.R. 1555, reads in the relevant part:

> "Sec. 336(d) FEES. --
> "(1) SERVICES TO WHICH FEES APPLY. -- If the regulations prescribed pursuant to subsection (a) permit a licensee to offer ancillary or supplementary services on a designated frequency --
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> > "(A) for which the payment of a subscription fee is required in order to receive such services, or
> > "(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party ...
>
> the Commission shall establish a program to assess and collect from the licensee for such designated frequency an annual fee or other schedule or method of payment that promotes the objectives described in ... paragraph (2).
> "(2) COLLECTION OF FEES. -- The program required by paragraph (1) shall --
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> > "(A) be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource;
> > "(B) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provisions of 309(j) of this Act...

H.R. 1555, 104th Cong., 1st Sess., Sec. 301. The Senate bill, S. 652, is similar:

> ...
> (2) COMMISSION TO COLLECT FEES. -- To the extent that a television broadcast licensee provides ancillary or supplementary services using existing or advanced television spectrum --
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> > (A) for which payment of a subscription fee is required in order to receive such services, or

requires the Commission to engage in a similar pricing determination for over-the-air broadcast spectrum. The House bill requires the Commission to impose such fees, the Senate bill permits the Commission to do so. The Committee report accompanying H.R. 1555 notes,

> The Committee intends that the Commission establish fees which are, to the maximum extent feasible, equal but do not exceed (over the term of the license) the amount the public would have received had the spectrum for such services been auctioned publicly under section 309(j) of the Communications Act, and which avoid unjust enrichment of the licensee for such use of the spectrum.

H.Rep. 104-204, Pt. I, 104th Cong., 1st Sess., Communications Act of 1995 at 117.

As noted above, the Alliance prefers a plan in which the entire additional 6 MHz is auctioned, or in which some spectrum is earmarked for broadcasters at a fee that approximates the fees that would have been collected pursuant to auction under 309(j)

> (B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party ...
>
> the Commission may collect from each such licensee an annual fee to the extent the existing or advanced television spectrum is used for such ancillary or supplementary services... The amount of such fees to be collected for any such service shall not, in any event, exceed an amount equivalent on an annualized basis to the amount paid by providers of a competing service on spectrum subject to auction under section 309(j) of the Communications Act of 1934...

S. 652, 104th Cong., 1st Sess. Sec. 206(a).

of the Communications Act.[87] As a matter of fiduciary responsibility to the taxpayers of the United States, the Commission should require the entire spectrum to be auctioned if a prospective licensee proposes provision of A&S which consume more spectrum than the portion the broadcaster would use for ATV transition. At the absolute minimum, any license which authorizes services beyond the operation of one ATV channel should be auctioned, or issued subject to "quasi-auction" fees, calculated on the basis of the A&S the licensee proposes to provide.

Subject to federal court action, The Commission may also consider the possibility of requiring licensees to carry broadcast video signals in addition to their own.[88] Such a leasing arrangement will allow broadcasters to make a transition to ATV at a much more nominal expense; this would also permit other broadcasters to enter the market. In a four-hundred channel universe, moderate "common carriage" requirements will exponentially expand the opportunities for expressive communication.

Creating a legal structure in which an ATV broadcaster leases spectrum from the government may provide a legal framework

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[87]. Section 309(j) permits competitive bidding for mutually exclusive applications if, inter alia, "the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers..." (emphasis added). 47 U.S.C. Sec. 309(j)(2)(A).

[88]Some constitutional restrictions may apply with regard to any scheme requiring broadcasters to carry unaffiliated signals. See Turner Broadcasting, System, Inc. v. FCC, ___ U.S.___, 114 S.Ct. 2445 (1994), and note 84 supra.

which may permit allow the Commission to impose a somewhat more stringent public interest requirement on broadcasters than current First Amendment jurisprudence would allow. Lease requirements would permit government entities to receive fair market value from the lease. This would also relieve broadcasters of the uncertainty surrounding license renewal. A minimum requirement of this scheme should be that incumbent leaseholders be required to sublet some of their channels to unaffiliated entities.

B. The Commission Should Reserve Capacity and Earmark Funding to Meet Its Programming Policy Goals.

On numerous occasions, the Commission has stated that its goals in broadcast policy were to promote the public interest, convenience and necessity by requiring licensees to adhere to a minimum, non-quantitative standard of behavior. This standard is generally regarded as requiring some minimal amount of local and/or public affairs programming, educational programming for children, and equal access and right of response for political candidates.[89] These requirements are considered by some to be amorphous and in practice meaningless.[90] The advent of ATV gives the Commission significant new alternatives to promote greater adherence to these goals.

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[89] See M. Hamburg, Communications Law and Practice at Secs. 2.01-2.04 (1995); See also Options Papers at 65-79.

[90] Fahri,"Longest Running Show..."Washington Post, October 13, 1995 at A1.

The Alliance continues to support the concept that broadcasters should adhere to public interest guidelines, whether as licensees or lessees. At minimum, public interest guidelines should contain a quantitative measure of programming that: provides local news and information; discusses local affairs and regional affairs; meets the educational needs of children and adults; assists in the provision of non-profit/charitable/health care/social services; and provides a means for elected officials and non-profit and philanthropic organizations to communicate with their communities. Many commentators have suggested that the broadcast industry make time available to candidates for local, state and federal office for free as a matter of civic participation. The sudden surfeit of channels could allow C-SPAN type coverage, local public affairs programming, electoral activities, and community meetings to be broadcast on just a few of the channels that will be now be available.

A portion of proceeds from leases, licenses or royalties for ATV should be earmarked for a public interest broadcasting fund, similar in operation to PBS or the funding mechanism which provides for C-SPAN. Local licensees would contribute either to a local fund or through the Commission, which would disburse the funds to local public, educational, or governmental broadcast entities. In this way, broadcasters could meet their local public affairs obligations via contribution as well as by creating programming themselves. The fund would provide for educational and cultural broadcasts, and non-profit, governmental

and public access to the broadcast medium.

Payment into this fund as a cost of holding an ATV license would achieve the Commission's goals to promote news, public affairs, cultural and educational programming without creating the danger of possibly interfering with broadcasters' First Amendment rights. Its nominal cost, in comparison to the market value of the spectrum being sought, should make this an attractive alternative to the imposition of quantitative standards on NTSC and ATV broadcasters.

IX. CONCLUSION.

For the foregoing reasons, the Alliance urges the Commission to recognize the interests of the educational, charitable, and civic sector as it devises telecommunications policy for the 21st Century, and to implement ATV in a manner will reflect the goals, not only of the broadcast, entertainment, and telecommunications industries, but of American children and American families.

Respectfully Submitted,

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